IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 79

JULIA RHODA AARON, ET AL. ..... *Petitioners*

v.

FORD, BACON & DAVIS, INCORPORATED ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONERS

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BRIEF OF PETITIONERS

This case is pending here on writ of certiorari granted une 27, 1949, to review the final judgment of the United States Court of Appeals for the Eighth Circuit.

The transcript of record for use in this Court is bound n three sections, consisting of the record, the supplemental ecord, and the proceedings in the Court of Appeals. Each ection carries its own pagination. When reference is made n this brief to any of the records, we will designate that art of the first section, consisting of the record, as R.); the second section consisting of the supplemental ecord, as (S.R.); that part consisting of the proceedngs in the Court of Appeals, as (C.R.).

OPINIONS OF THE COURT BELOW

The Court of Appeals in this cause, *Julia Rhoda Aarons et al. v. Ford, Bacon & Davis, Inc.*, 174 F. 2d 730 (C.R.7-9), adopted its opinion in the companion case of the *United States Cartridge Company, a Corporation, v. R. M. Powell, et al.*, 174 F. 2d 718 (C.R.9-33).

JURISDICTION

The jurisdiction of the Court was invoked under Title 28 U.S.C. 1254, which was a consolidation of Sections 346 and 347, Title 28 U.S.C. Jurisdiction was urged because: (1) The questions presented were of special and outstanding importance in the interpretation of the Fair Labor Standards Act, which decision would affect many like cases pending in the various District Courts and which cases are being held in abeyance awaiting a decision of this Court; (2) the decision sought to be reviewed is in conflict with those of the Courts of Appeal for the Sixth, Seventh and Ninth Circuits; (3) the opinion is in conflict with the decisions of this Court in the former's holding that a "cost-plus-a-fixed-fee" contractor is a mere agency of the United States Government; (4) petitioners were entitled to the benefits of the Fair Labor Standards Act; (5) said opinion decided important questions of Federal law which have not been, but should be, settled by this Court; (6) said opinion has decided directly one question, and inferentially other questions, probably in conflict with decisions of this Court.

STATEMENT OF THE CASE

The Arkansas Ordnance Plant was constructed and operated at Jacksonville, Arkansas, in 1941-1945. It was built under a cost-plus-a-fixed-fee contract, and after its completion was operated on the same basis (S.R.21-73). As will be shown from cited cases in the brief, the contract is substantially similar to other Government contracts, some of which were for the operation of ordnance plants.

During the period of operation of the plant, petitioners were employed in various capacities. The capacity in which any one of the petitioners may have been employed and whether that *capacity* or classification is within the coverage of the Fair Labor Standards Act is not in issue. The question is whether the Walsh-Healey Act applied to the exclusion of all other Acts, and if not, whether the Fair Labor Standards Act is applicable.

At the Arkansas Ordnance Plant detonators and primers were loaded or processed, and in addition thereto some of the facilities were devoted to assembling fuses. As indicated by one of the affidavits filed in this cause, about 75% to 85% of the quantity of ordnance items produced were detonators and primers (R.51). 15% to 25% of the production could be said to be devoted to fuses. After processing and assembling of the parts it was necessary to ship the elements to other plants outside of Arkansas for further processing and assembling before they were ready for use or consumption (S.R.51).

On the lines the parts underwent inspection by employees of respondent, and were then loaded in conformity with manuals and loading data supplied by the Ordnance

Department of the Army. Those instructions were in the form of specifications relating to the dimensions of particular items, the processes, and the quality and quantity, as well as testing and inspection criteria. The items when loaded were inspected by the operating company's personnel, assembled into lots, and delivered to the War Department for acceptance. Prior to acceptance, the Ordnance Department of the Army made spot checks to determine whether the lots were acceptable (S.R.51).

Primers were loaded or assembled from many items shipped in from other States. Fuses were larger and more complex (S.R.51).

In the operation of the plant, the Government officers made the usual checks and examinations of payrolls, etc., to determine that the money was being properly expended. The manuals of operation and the specifications for all components loaded, processed, or manufactured originated *in the Office* of the Chief of Ordnance, War Department. The regulations pertaining to safety and safety measures, especially those relating to the handling of explosives, were furnished to the operating agent by the Ordnance Department (S.R.51).

Respondent was the agent charged with the operation of the plant (S.R.39). The terms of the contract show conclusively that the operating agent was an independent contractor. It was required to pay unemployed insurance and carry workmen's compensation insurance (S.R.66, 67). In fact, income taxes were withheld by them and remitted in their name through their New York office; compensation payments were made in accordance with Arkansas law; social security withholding and contribu-

tions were made in the name of Ford, Bacon & Davis, Inc.; group insurance was made available with the premiums being paid in the name of the respondent (R.45).

Respondent set up its personnel division, and was responsible for the hiring of some 79,000 employees (R. 44). A report was made of all personnel changes on accounting forms to the Commanding Officer of the Plant for accounting purposes, but at no time did the Government attempt to control the hiring, firing or the conduct and discipline of the employees (S.R.46).

In short, the plant was designed and constructed to process items of ordnance necessary to the prosecution of the war. The War Department did not have the managerial personnel to operate the plant. Thousands of plants had to be built and operated at Government expense. Where possible a company was selected as operating agent that was engaged in a similar peace time activity. The Government, by such a contract and procedure, could detach a small number of personnel to see that specifications were followed, Government property not misappropriated, and Government funds properly expended.

The set-up at the plant presented no unique, unusual nor extraordinary features. It was like the Louisiana Ordnance Plant, the Iowa Ordnance Plant, the Lake City Ordnance Plant, etc.

The petitioners brought their action under the Fair Labor Standards Act (R.3-13). The respondent filed motion for summary judgment on the ground it was not engaged in commerce or the production of goods for commerce, that petitioners were employees of the United

States, and that the Portal-to-Portal Act constituted a bar (R.17). The District Court, on the motion for summary judgment and response thereto with the respective affidavits, found that respondent was not engaged in commerce or the production of goods for commerce and ordered the summary judgment (R.56-58).

The District Court expressly limited its consideration of the case and finding to that single issue (R.57).

On appeal the issues of commerce, independent contractor and employee relationship were briefed and argued. The Court of Appeals found that the Walsh-Healey Act was exclusively applicable and affirmed the judgment of the District Court (C.R.7-9).

The important question to be determined by this Court is whether the Fair Labor Standards Act applies to employees engaged in the production of ordnance items under a cost-plus-a-fixed-fee contract.

SPECIFICATIONS OF ERROR

The Court erred—

I. In holding that petitioners' employment by respondent was governed by the terms of the Walsh-Healey Act to the exclusion of the Fair Labor Standards Act.

II. By failing to hold that petitioners were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

III. By failing to hold that petitioners were employees of respondent, an independent contractor.

ARGUMENT

SUMMARY

I. Petitioners contend that the provisions of the Fair Labor Standards Act and the Walsh-Healey Act are not exclusive of each other in their application to the employment of petitioners by respondent.

In all Government contracts which exceed $10,000.00, it is required that certain stipulations based upon the Walsh-Healey Act be incorporated (41 USC s. 35), but that requirement does not exclude the provisions of the Fair Labor Standards Act whenever applicable. The latter is a law of like dignity with the Walsh-Healey Act, and whether any of its provisions were incorporated in the contract under consideration or not, if they were applicable to the situation, that law also must be given equal force. Such was the interpretation placed upon it by the Secretary of Labor when the Fair Labor Standards Act was being considered by Congress. Likewise, a similar construction was made by the Wage-Hour Division of the Department of Labor; inspections by that department were made concurrently under both Acts in nearly all cases, as the Department considered the establishments inspected were covered by both Acts.

Such interpretation was well known to Congress from the several reports of the Department of Labor, and it can reasonably be assumed the interpretation was approved by Congress, as it continued to make appropriations for the enforcement of both Acts.

The Fair Labor Standards Act is more beneficial to employees than is the Walsh-Healey Act. In order to en-

force an employee's right to recover for unpaid wages under the latter Act, it would necessitate an officer of the Government first to determine that such a right existed; a suit by the Government *might* then be instituted. Nothing in the Walsh-Healey Act compels the Government to enforce the right. Under the Fair Labor Standards Act it is not necessary for an employee to depend upon the decision and action of a Government officer—he has the privilege of instituting an action in his own behalf.

The contention that the Government would be penalized by judgments obtained under the Fair Labor Standards Act upon the theory that such judgments would have to be paid ultimately by the Government, is not tenable when the contract provides full protection to the Government in cases of violation by the contractor for failure to pay overtime compensation to any employee (S.R.44).

II. If the Court is of the opinion that the Fair Labor Standards Act is applicable, determination must be made of two contentions originally raised in the District Court. The first one is that petitioners produced goods for commerce within the meaning of the Fair Labor Standards Act.

Petitioners were engaged in the manufacture and processing of munitions from materials purchased outside of Arkansas, shipped to the plant, and when finished (or if not finished and further processing at points outside Arkansas was necessary), were loaded by the employees on railroad cars or in trucks operated by petitioners and transported to points outside the State.

Although the materials shipped into the plant belonged to the Government, nevertheless it was necessary for the employees of respondent, an independnt contractor, to process them, and to ship them to points outside of Arkansas for further processing before becoming finished products. The fact that the contractor was operating under Government contract was not a license to it to maintain substandard labor conditions, while private contractors were prohibited from doing so, and particularly at a time when all or nearly all major industries were operating under Government contracts.

No weight should be given to the contention that the goods were produced for war purposes, and for that reason were not the subject of interstate commerce. Many industries manufactured and shipped food, shoes, clothing, and other goods which were used by the armed forces. They were just as essential for carrying on the war as were munitions. Those industries certainly were subject to the Fair Labor Standards Act when such goods were produced and shipped in commerce. There would seem to be no good reason why one class of employees should be permitted to enjoy the benefits of the Fair Labor Standards Act while the other would be deprived of such benefits.

III. As a component part of their right of action under the Fair Labor Standards Act, petitioners contend that they were employees of respondent, an independent contractor, and not of the United States.

That contention is borne out not only from a reading of the terms of the contract between respondent and the Government but also by the interpretation of the contract by the parties themselves and by the acquiescence of re-

spondent to the inspections made of its plant by the Wage and Hour Division of the Department of Labor.

Under the terms of the contract respondent had supervision and direction of the operation of the plant, and it employed and discharged workmen at the plant; the only supervision which the Government maintained over the contractor or the employees was that the Government directed the specifications of work on the materials and that the contracting officer might require the contractor to dismiss from work any employee deemed incompetent by the contracting officer or whose retention was deemed to be not in the public interest.

This Court (as will be pointed out in detail in the proper places) has upheld the contention here made in cases where there were contracts similar to the one under consideration in this cause.

The Government required that respondent afford adequate protection to the employees in the matter of unemployment compensation insurance and workmen's compensation insurance, which requirements would not have been embodied in the contract if it had been contemplated that the workmen were to be considered employees of the United States.

The Government had the right, of course, to staff the plant with its own employees or with enlisted men of the Army if it saw fit to do so. It knew, however, that it was necessary to have the plant operated by trained personnel whose training would be directed by those experienced in the work, such as respondent.

I

The Walsh-Healey Act Not Exclusive

The Court of Appeals held that the Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U.S.C. 35-45) and the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C. 201) are mutually exclusive and that only the Walsh-Healey Act is applicable in the present case. The Court, therefore, held that since the suit was not under the Walsh-Healey Act, the action of the District Court in dismissing the claims should be affirmed.

In the District Court the respondent had filed a motion for summary judgment on the grounds that the petitioners were not engaged in commerce or in the production of goods for commerce, that they were employees of the United States and therefore excluded by the express terms of the Fair Labor Standards Act, and that the Portal-to-Portal Act barred their action (R.17). The District Court expressly limited its consideration of the case to the issues of commerce and production of goods for commerce, and, finding that the employees were not engaged in commerce or the production of goods for commerce, granted the motion for summary judgment (R.56-58).

The action of the employees (petitioners) was bottomed solely on the Fair Labor Standards Act (R.3-13). The Walsh-Healey Act was not pleaded by the respondent as a defense to the claims (R.13-16), was not considered by the District Court, and was not briefed or argued by the petitioners in the Court of Appeals. However that might be, the question of the applicability of the Fair

Labor Standards Act and of the Walsh-Healey Act is before this Court on a comprehensive and adequate record.

The applicability of the Fair Labor Standards Act will be discussed elsewhere in this brief, and this section will be devoted to the Walsh-Healey Act.

The argument may be subdivided into (1) the two acts are not mutually exclusive, (2) the Walsh-Healey Act does not require the exclusion of the employees from the benefits of the Fair Labor Standards, if otherwise within the scope of the latter Act, (3) the purposes of the two acts permit the employee to enjoy the benefits of both, and (4) The Fair Labor Standards Act by its own terms does not exclude employees engaged in commerce or the production of goods for commerce from its benefits because the contract is with the Government.

(1) The two Acts are not mutually exclusive.

The Court of Appeals found that the contract under which the Arkansas Ordnance Plant operated contained the stipulations required by Walsh-Healey Act (49 Stat. 2036), 41 U.S.C. 35, and deduced therefrom that the stipulations were conclusive and the Walsh-Healey Act alone governed. It was overlooked that these stipulations are a part of *every* contract made by the Government for supplies in excess of $10,000. There is no doubt but that the provisions of the Walsh-Healey Act apply to this contract and all similar contracts. The need for supplies created by war conditions doubled and trebled many times the number of contracts subject to the Public Contracts Act. The annual reports of the Secretary of Labor to Congress for the years 1944, 1945 and 1946 point this fact out quite clearly. But this does not mean that the petitioners as

employees of the respondent were not also covered by the Fair Labor Standards Act and entitled to its benefits.

When that Act was under consideration by Congress, the Secretary of Labor, reporting to a joint hearing of the Senate Committee on Education and Labor and House Committee on Labor stated (81 Cong. Rec., Appendix 1484, 75th Cong. 1st Session, June 15, 1937) said:

> "The bill also overlaps to some extent the administrative performance with respect to Government contracts under the Walsh-Healey Act. This Act has been in effect for almost a year and has played a part in bringing about reemployment through its provisions for a 40-hour week and other standards by firms having contracts with the Government. This measure was enacted after the invalidation of the codes as it was considered at that time that it provided the only safe constitutional avenue of approach to the preservation of wage and hour standards by the Federal Government. It applies to persons contracting with the Government, regardless of the effect of the activities of the contractor on interstate commerce. A case in point would be certain distributive concerns engaged in intra-state business. Since it therefore covers employers outside the ambit of the fair labor standards bill, I believe it should be continued in full force and effect subject to the qualification that its labor standards should be integrated with the child labor standards and the fair labor standard orders which this bill contemplated, for it does not seem desirable to have two sets of standards for the same industry."

Section 4(d) of the Fair Labor Standards Act required the Administrator to submit annual reports to Congress.

In his annual report for 1943, page 9, the Administrator noted that the integration of the Wage and Hour (FLSA) and Public Contracts (W-H) Divisions had been completed, and that out of a total of nearly 8,000 inspections under the Walsh-Healey Act, all but 300 of them were concurrent with Wage-Hour inspections (FLSA).

The annual report of the Administrator for 1944, page 10, reads:

> "Many establishments are covered under both Acts so that it is impossible to give separate figures for restitution, which in many cases would be *due under either*. Of the 54,431 inspections completed during the year, 11,900 were made under the Public Contracts Act, all but 269 of which were concurrent with Wage-Hour inspections." (Italics added.)

In his report for the year 1945, page 2, the Administrator called to the attention of Congress that—

> "Under the Public Contracts Act during the fiscal year 131,733 public contracts with a total value of $35,965,367,880 were reported to the Divisions, exclusive of secret, confidential and restricted contracts. In both number and value, this is greater than ever reported in any previous year, greater, indeed, than the total for the first six years the Act was in force beginning in 1937."

> "Many establishments are covered under both Acts, so that it is impossible to give separate figures for restitution which in many cases would be due under either Act. Of the 44,300 inspections completed during the year, 9,400 were made under the Public Contracts Act, all but 160 of which were concurrent with Wage-Hour inspections."

In his Report for 1946, page 14, after making refer-ice to tables showing pertinent data, the Administrator ain called to the attention of Congress the applicability both acts, saying:

> "*Since nearly all establishments subject to the Public Contracts Act are also subject to the Fair Labor Standards Act*, few establishments are selected for inspection only because of receipt of Government contract awards." (Italics added.)

Pages 5 and 6 of the Report for the year 1948 makes e same statement of application of the two acts reiterat-g that "although the latter Act (Walsh-Healey Public ontracts Act) differs from the Fair Labor Standards ct in its application and provisions, it was logical that spections under the two acts be conducted simultaneous-, since most employers subject to the Public Contracts ct, which applies to manufacture or supply contracts by the Government for equipment and supplies in nounts over $10,000, are subject to the Fair Labor Stan-rds Act".

There is a rule of long standing that where Congress aware of the interpretation placed upon an Act by the epartment charged with its administration, and ac-uiesces over a long period of time with that interpreta-on, it is presumed that Congress has approved the ad-inistrative interpretation as expressive of its own intent-nd purpose. This is especially true when continued ap-ropriations are made on the basis of reports submitted the administrative authority. *Brooks* v. *Dewar*, 313 . S. 354; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; see lso *Wells* v. *Nickles*, 104 U. S. 444, 447; *Isbrandtsen-oller Co.* v. *United States*, 300 U. S. 139, 147.

Since the department charged with the responsibility of the two acts construed them as not being mutually exclusive, but that most of the employers subject to the Walsh-Healey Act were also subject to the Fair Labor Standards Act and this construction was in effect approved by the Congress, it would appear that if the requisites necessary to the application of the Fair Labor Standards Act were present, and the contract was with the Government for equipment or supplies in an amount in excess of $10,000, both acts would apply. There is nothing in either act that requires the employee to make an election. Cf. *Brooks* v. *United States*, 337 U. S. 49. But, as pointed out by the Secretary of Labor, *supra*, the two acts may overlap. This usually occurs when the activity of an employer is outside the ambit of the Fair Labor Standards Act; examples, of course, are employers not engaged in commerce or the production of goods for commerce, retailers and others expressly excluded by the latter act. These are very few in number, 300 out of 8,000 inspections in 1943, 249 out of 11,900 inspections in 1944, 160 out of 9,400 inspections in 1945. It is especially interesting that in 1944, 131,733 public contracts were let, excluding secret, confidential and restricted contracts. All of these were covered by the Walsh-Healey Act. Only a very small percentage did not come under the Fair Labor Standards Act. Because of the large number of inspections and because restitution were generally due under *either* act, the Administrator did not attempt to give separate restitution figures. Annual Report 1945, page 2.

Congress expressly recognized that both Acts may apply to the same employer. In 1942 Congress amended subsection (a) of section 1 of the Walsh-Healey Act by adding thereto: "Provided, that the provisions of this

subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an Act entitled 'Fair Labor Standards Act of 1938' ". (52 Stat. 277, chapter 306) It would be meaningless to exempt an employer from the provisions of a part of one Act because of agreements made under another Act unless both Acts were applicable. It is to be noted that Section 7 (29 U.S.C. 207), of the Fair Labor Standards Act applies only where "employees are engaged in commerce or in the production of goods for commerce"; and has to do with collective bargaining agreements; subsection (c) of section 1 of the Walsh-Healey Act applies only to "persons employed by the contractor in the manufacture or furnishing of materials, supplies, articles, or equipment used in the performance of the contract * * *" (41 U.S.C. 35 (c)), and prescribes the eight-hour work day and the forty-hour work week. It is apparent Congress intended by the amendment that employees of a contractor engaged in the manufacture of materials, etc., should not work more than eight hours in one day or forty hours in one week, unless, being also engaged in commerce or the production of goods for commerce, they made an agreement for a longer work day or work week as a result of collective bargaining.

In rejecting the theory that the Fair Labor Standards Act applied, the opinion states:

> "Nor are we impressed with the view that Congress intended that when an industry was engaged in producing munitions of war for the United States under a cost-plus-a-fixed-fee contract and failed to pay an employee not only his unpaid wages but also an amount equal thereto as liquidated damages, and,

in addition, his attorney fees, when another method of safeguarding the employees' rights had been provided which does not entail such a penalty against the United States" (S.R.22).

In voicing such an objection, the opinion loses sight of the fact that the judgment would not be against the United States but against the contractor. The reply to that would be that ultimately the Government would have to reimburse the contractor for any such judgments, and, therefore, strictly speaking, the judgment would be against the Government. We submit that the Government fully protected itself against any such contingency when the contract was prepared and executed.

Article II-D of the contract provides: "The provisions of I-G of Title I shall apply to the work under this Title II" (S.R.38).

Title I-G fixes the hours at eight per day, with time and a half for overtime. For each violation a penalty of $5.00 would be imposed upon the contractor for each laborer or mechanic for every calendar day an employee was required to work over eight hours, and all such penalties imposed should be withheld for the use and benefit of the Government (S.R.36).

If, therefore, the Government had the right to withhold $5.00 per day from the contractor for each day's overtime per employee, that would more than equal the amount recoverable by an employee for a day's overtime. For example, in the suits for overtime during the lunch period (one half hour), based upon the highest rate paid an employee, 66¢, as shown by the Payroll Authorization Exhibit (S.R.155), the amount recoverable for time and a half would be 49½¢, and a like amount for liquidated

damages: total 99c. The attorney's fee would not average more than a like amount (not that much), making a grand total of $1.98. So that, the $5.00 penalty provided by the contract would more than compensate the Government.

The Government is further protected by Article V-B, paragraph 5, of the contract: "Upon completion of the work under Titles I and II . . . . . and again upon completion of the work under Title IV, the Government shall pay to the contractor the unpaid balance of the cost of the work determined under Title V hereof, and of the fees, *less any sum that may be necessary to settle any unsettled claims for labor or materials, or any claim the Government may have against the contractor*" (S.R. 55, 56). (Italics supplied.)

(2) The Walsh-Healey Act does not require exclusion of the employees from the benefits of the Fair Labor Standards Act.

The amendment of 1942 to the Public Contracts Act seems to indicate clearly that Congress recognized application of the Walsh-Healey Act would not exclude employees from the benefits of the Fair Labor Standards Act if otherwise entitled to the benefits of the latter Act. The Public Contracts Act contains exceptions as to certain public contracts (41 U.S.C. 43), and makes reference to its effect on other laws (41 U.S.C. 42), none of which applies to the Fair Labor Standards Act. But nowhere is there to be found any provision excluding operation of any other Act. Congress had the opportunity to amend the Act to so provide, and in 1942 enacted the amendment referred to above. The failure to provide by amendment exclusiveness of application constitutes evidence that Congress did not intend the Public Contracts Act to work

the exclusion of the Fair Labor Standards Act. Where Congress has not pronounced a doctrine of election or exclusiveness of remedies, the courts will not do so. *Brooks* v. *U. S.*, *supra*.

(3) The two Acts permit the employees to enjoy the benefits of both.

The Walsh-Healey Act was considered at the time of its enactment as the only safe constitutional approach to improving the working conditions and raising the wages of that segment of industry doing business with the Government. It was not a statute of general application. It provided for an 8-hour work day and a 40-hour work week; the Secretary of Labor had the right to determine the minimum wages to be paid, and, if permission were granted for work in excess of the stipulated work day and work week, to provide for the rate of overtime, to be not less than one and one-half times the base rate; no male under sixteen nor female under 18 should be employed; and the working place and conditions must not be unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract (41 U.S.C. 35). Money penalties were prescribed for under age penalties; cancellation of contract; and collection of amounts underpaid, the sums to be held in a special fund for one year, and then covered in the Treasury.

Because only a small segment of industry was affected by the Act, and further because of the difficulty and cost of administration, a more comprehensive and effective law was needed. In 1938 the Fair Labor Standards Act was placed on the statute books. It applied to all employees engaged in commerce or the production of goods for commerce. Its general purpose was to exclude from

interstate commerce goods produced under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being, *U. S. v. Darby Lumber Co.*, 312 U. S. 100. It establishes minimum wages; maximum hours; maintenance of adequate records and inspection by proper authorities; provides drastic penalty in the nature of fine and imprisonment for violation of the terms of the act and injunctions to prevent future violations; actions by employees directly for unpaid minimum wages or unpaid overtime compensation with a like amount in liquidated damages, the allowance of a reasonable attorney's fee, and prohibits child labor.

Both acts have received a liberal construction. *Perkins v. Lukens Steel Co.*, 310 U. S. 113; *Tennessee Coal, Iron and R. Co. v. Muscoda Local No. 123*, 321 U. S. 590.

A casual reading of the two Acts is sufficient to convince one that the Fair Labor Standards Act is more beneficial to the employee. The minimum wages and overtime rate of the two Acts are practically the same. Under the Public Contracts Act; he must make demand upon the Government within one year for payment of any unpaid wages the Government may have collected for him; while under the Fair Labor Standards Act he may sue his employer directly within the time allowed by the Statutes of Limitation of his own state and recover not only the amount due, but a like sum in liquidated damages and an attorney's fee. Under the first Act his right to payment of unpaid wages depends on the action of the Government, which, because of lack of funds or personnel, may not be able to act in his behalf. Under the latter Act, he has an absolute right to recover unpaid wages, regardless of the action or inaction of the Government. The reports

of the Secretary of Labor for the years 1943 through 1947 clearly demonstrate the inadequacy of the Public Contracts Act. As an example, in 1944, 131,733 public contracts were let, but only 9,400 or 7.1% inspections were made. Thus the employees engaged in the performance of 122,333 public contracts were denied their rights for unpaid minimum or overtime wages under the Walsh Healey Act, and would have been denied all right to recover their unpaid wages had they been excluded from the coverage of the Fair Labor Standards Act.

The same percentage applies to the other years. In all probability the Administrative authority will never have adequate personnel or funds to make one hundred percent inspections of all employers engaged in the performance of contracts within the Public Contracts Act. The prime purpose of this chapter (29 U.S.C. 201-219) was to aid the unprotected, unorganized and lowest paid of the nation's working population, that is, those employees who lack sufficient bargaining power to secure for themselves a minimum subsistence wage, *Brooklyn Sav. Bank v. O'Neill*, 324 U. S. 697. It was designed to extend the frontiers of social progress by insuring to all able bodied working men and women a fair day's pay for a fair day's work, *A. H. Phillips, Inc., v. Walling*, 324 U. S. 490. This chapter, *supra*, was intended to secure to workmen the fruits of their toil and exertion, *Tennessee Coal, etc. v. Muscoda Local No. 123, supra.* See also, *Overstreet v. North Shore Corporation*, 318 U. S. 125; *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572.

To exclude employees engaged in commerce or in the production of goods for commerce from the benefits and protection of a general act designed to secure them a fair day's pay for a fair day's work because their labor hap-

pened to be devoted to the performance of a supply contract with the Government, while, at the same time, failing to secure to them a fair day's pay for a fair day's work under the Public Contracts Act, is bound to defeat the purposes of both Acts. Congress was informed by the administrator that restitution or recovery of unpaid minimum wages and overtime could not be adequately accomplished under the Walsh-Healey Act. Congress, however, at the same time was advised that the Administrator, whom it had in effect appointed as its agent, was requiring restitution of unpaid wages or overtime on the theory that both Acts were applicable. Had Congress thought that employees, millions of them, would not have the right and opportunity to collect unpaid minimum wages or overtime due them because of the mutual exclusiveness of the two acts, it would have, no doubt, passed legislation abrogating such an inconsistency.

To society, both acts were beneficial in that they prohibited child labor. To the economy of the nation and to the workman, the minimum wage was beneficial. But primarily of concern to the worker was his ability to *collect* wages and overtime due him. The Walsh-Healey Act gave the *Government* the right to collect the unpaid wages due the employees of a firm and to make disbursement to those employees *if* they made specific demand within one year. But to be able to make a demand upon the Government for disbursement, an inspection must have been held and a determination made by the government of amounts due the employees, and the employees must have filed their claims within a year. Because of inadequate personnel, very few inspections and determinations could be made. Report for 1946, page 17, reflect that for all industries subject to the two acts, only eight

percent were inspected; the report for 1948, page 43, reflects that of 29,024 establishments inspected, 14,996 were in substantial violation of the overtime provisions of the two acts. It is illuminating that in 1948 the few inspections made revealed that a total of $10,757,914 in back wages were found to be due employees. (Report for 1948, page 48.) If $10,757,914 in back wages due represented only 8%, 100% would amount to $134,473,924. Taking 1946 an average year, 92% of the employees purportedly protected by the Walsh-Healey Act were not afforded the right or opportunity to recover unpaid minimum wages and overtime guaranteed them by the Act. Their right of recovery, if any, was to be found in provisions of the Fair Labor Standards Act. If the acts were mutually exclusive, then 92% of the employees subject to the Walsh-Healey Act were penalized. It was never the intention of Congress that 92% of the employees engaged in the performance of public contracts would be penalized by being in effect excluded from the provision of *any* act made for their benefit!

(4) The Fair Labor Standards Act does not exclude employees engaged in the performance of a public contract.

The Act does not by its terms or by implication exclude from its coverage employees who may be engaged in the performance of a public contract. The Act, being comprehensive and designed to cover the entire field, specifically exempted those activities and groups to which it did not apply. These exemptions are contained in Section 13 of the Act (29 U.S.C. §213). The exemptions define in one classification certain activities, i.e., employee in executive, etc., capacity; retail or service establishment; seamen; catching, etc., of fish; agriculture; employees of

small newspapers; street car employees; employees engaged in handling, etc., of agricultural or horticultural products; small switchboard operators. Other exemptions are by reference to existing law, for example, employees subject to the provisions of sections 181-188 of Title 45 (which relates to employees (carriers by air) to which Inter-state Commerce Commission has power to establish qualifications pursuant to section 304 of Title 49 (Transportation - Railroads). Nowhere is there any exemption of employees of an employer subject to provisions of sections 35-45 of Title 41 U.S.C. (Walsh-Healey Act). On the contrary, Congress, in its effort to make plain that the application of this Act *should not exclude* application of other laws, provided in Section 18 (41 U.S.C. 218) that "no provisions of sections 201-219 (the Fair Labor Standards Act) of this title or of any order thereunder shall excuse non-compliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under such sections or a maximum workweek lower than the maximum workweek established under such sections, and no provision of sections 201-219 of this title relating to the employment of child labor shall justify non-compliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under such sections".

The above quoted section was directed to three possible contingencies. One would be where the employer engaged in the performance of a public contract and thus subject to the minimum wage, maximum hours, and child labor provisions of the Walsh-Healey Act. The other two where the State or City had higher standards. It is to be noted that section 18 of the Fair Labor Standards Act does not exempt employees covered by other acts from

the provisions of the Fair Labor Standards Act, but only goes so far as to provide that *compliance* with provisions of the Fair Labor Standards Act *will not excuse* them from compliance with other applicable laws.

It would be but stating the obvious to say that unless the Fair Labor Standards Act *were also applicable*, the provisions of section 18 would be meaningless and without significance. Congress clearly intended by section 18 to make both acts applicable. Suppose that the minimum wage under the Fair Labor Standards Act was 40 cents and under the Walsh-Healey Act undetermined (as happens to be true in *this very case*) and that the employer had not complied with the State requirements as to working conditions. The employer could be prosecuted under the Public Contracts Act for failure to provide sanitary and safe working conditions, and the employees could sue under the Fair Labor Standards Act for minimum wages. Unless this were so, the employees of Ford, Bacon and Davis, Inc., petitioners herein, though presumably engaged in commerce or the production of goods for commerce and otherwise subject to the Fair Labor Standards Act could be paid 20 or 25 cents an hour without recourse on the part of the employees.

Section 18 of the Fair Labor Standards Act arose in the case of *Butte Miners' Union No. 1 v. Anaconda Copper Mining Co.*, 112 Mont. 418, 118 P. 2d 148, which held that "where not inconsistent, the State and Federal provisions jointly govern". The same reasoning would apply to the two Federal acts: they are not inconsistent. Two Federal Courts have passed on this question. The District Court for the Eastern District of Tennessee in the case of *Lasater v. Hercules Powder Company*, 73 Fed. Supp. 264, said

"from an examination of the Eight-Hour Law, the Bacon-Davis Act and the Walsh-Healey Act, together with the congressional history of labor laws raising standards of pay and working conditions, the conclusion is quite evident that the intended coverage of the Fair Labor Standards Act is not restricted because of these previous enactments". In that case the Walsh-Healey Act had been pleaded as a defense on the theory it was exclusive.

The Court of Appeals for the Sixth Circuit, in *Walling* v. *Patton-Tully Transportation Company*, 134 F (2) 945, considered whether the Eight-Hour Law (27 Stat. 34, amended 37 Stat. 726, 40 U.S.C. 121) and the Fair Labor Standards Act were mutually exclusive. As the reasoning of the Court, cogent and peculiarly applicable to the instant case, it will be quoted in part. The Court said, *inter alia*:

> "We perceive no difficulty in the reconcilement of the Eight-Hour Law amendment with the Fair Labor Standards Act. The one limits employment at basic pay to forty hours a week, the other deals solely with the daily employment of men in certain classifications, and limits such employment at basic pay to eight hours a day. No difficulty will be perceived in complying with both statutes, giving over-time pay for work in excess of the weekly maximum, in the one case, and overtime pay for work in excess of the daily maximum, in the other, nor is there any insuperable difficulty in determining the basic rate. A weekly wage will be easily computed in terms of days or hours, a daily wage in terms of hours, and an hourly wage requires no computation in the determination of overtime pay.
>
> "If it be held that the Eight-Hour Law alone applies to the employees of the appellee, it would be permissive, as pointed out by the Administrator,

for the appellee to work its men 56 hours per week, and so long as they were not employed in excess of eight hours on any one day, no overtime compensation would be required. Intention to bring about such a result is not to be ascribed to Congress in the enactment of remedial legislation such as is here involved.

"Like the Fair Labor Standards Act, the Eight-Hour Law is one whose problem it is to eliminate substandard working conditions. As such it should be given construction to effect such purpose. * * * No reason appears why contractors for the Government are to be permitted to maintain substandard labor conditions while private contractors are prohibited from so doing, and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time when all, or nearly all, major industries are operating upon Government contract."

The maxim "*expressio unius est exclusio alterius*" is peculiarly applicable here. By detailed and specific exclusions, both by describing the activity and by reference to existing statutes, Congress left no doubt of its intentions as to who should be exempted. It is true that the maxim must be applied with caution and as an aid in ascertaining the true intention of Congress, yet where the statute is of general application and the exclusions are numerous and specific, there can be no doubt that it applies. *Continental Casualty Co. v. U. S.*, 314 U. S. 527; *Ford* v. *U. S.*, 273 U. S. 593.

As further proof that the employees were not excluded from the benefits of the Fair Labor Standards Act, attention is called to the passage of the War Labor Disputes Act of June 25, 1943 (50 USCA, App.

Secs. 1501-1511). The Act was enacted for the purpose of reconciling any labor troubles by reason of strikes, lock-outs, real or threatened, in any plant operating under "a contract with the United States entered into on behalf of the United States by an officer or employee of the Department of War, the Department of the Navy, or the United States Maritime Commission", for manufacturing, producing, etc., "any weapon, munition, aircraft, vessel, or boat". Sec. 1507 (a) (2) provided: "In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938 as amended; the National Labor Relations Act; the Emergency Price Control Act of 1942, as amended, and all other applicable provisions of law".

The enactment of that law conclusively establishes that it was not the intention of Congress that the Walsh-Healey Act alone should control the employment of those engaged in producing munitions for war, but that it considered the Fair Labor Standards Act as applicable to such employment.

II

Petitioners Were Engaged in the Production of Goods for Commerce Within the Meaning of the Fair Labor Standards Act

We assert the Court of Appeals erred in holding that the Walsh-Healey Act governed petitioners' employment to the exclusion of the Fair Labor Standards Act. Instead it should have held the Act covered petitioners' employment, and that petitioners were engaged in the production of goods for commerce.

The latter question is involved in *Creel, et al., v. Lone Star Defense Corporation*, 171 F. 2d 964, certiorari granted June 6, 1949. In that case the Court of Appeals, Fifth Circuit, held the employees were not engaged in the production of goods for commerce, but did not rule that the Walsh-Healey Act governed.

Should this Court sustain petitioners' contention that the Fair Labor Standards Act governed petitioners' employment, we assume the Court will dispose of the other questions that were raised originally when the District Court granted respondent's motion for summary judgment.

The undisputed facts show that petitioners were engaged in manufacturing and processing munitions from materials purchased outside of Arkansas, shipped to the plant, and when finished, or if not finished but needed further processing at points outside Arkansas, were loaded by the employees on railroad cars or into trucks operated by petitioners and shipped to points outside the State.

To ascertain whether petitioners were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of June 25, 1938, 52 Stat. 1060, 29 USC 201-219, we must look to the terms of the Act.

Section 3(b) of the Act reads:

> "Commerce means trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof."

Section 3(i):

> "'Goods' mean (including ships and marine equipment) wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof."

Section 3(j):

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if the employee was employed in producing, manufacturing, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

It is inconceivable how the contention can be sustained that petitioners were not engaged in the production of goods for commerce in the light of judicial interpretation of the term. Certainly petitioners manufactured and processed goods for transportation and transmission from the plant in Arkansas to points in other States, as defined by Section 3 (b) of the Act.

Petitioners "produced, manufactured, * * * handled" and "worked on" the goods, and were "engaged in the production of goods", they being "employed in producing, manufacturing, * * * handling, transporting" and "working on such goods, necessary to the production thereof", as defined by Section 3 (j) of the Act.

The "goods" produced or worked upon included "wares, products, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof", as defined by Section 3 (i) of the Act. The section excepted the inclusion of "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof".

In the trial of this cause the District Court adopted its own opinion previously rendered in *Barksdale* v. *Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690 (R.58, *et seq.*), as the opinion in this cause (R.57, 38). The Court there held that, as the Government was the owner of the goods that had been delivered to the plant and had physical possession of the goods at all times through its agent (respondent) and its own employees (petitioners), the Government became the ultimate consumer of the goods produced and processed, and for that reason petitioners could not recover.

The Barksdale case was one of the authorities relied upon in *Kennedy, et al.* v. *Silas Mason Co.*, 64 F. 2d 1016, judgment in which was vacated and cause remanded for further development by this Court. 334 U. S. 248. In both the Barksdale and Kennedy cases, the position was taken that the goods (munitions) manufactured and processed were not the subject of commerce, but were produced for use in the prosecution of war; that was is the negation of commerce. Such a theory is not sound. The late war was the direct means of stimulating commerce. Production of goods of various kinds was accelerated because of the war, and the sale or exchange of those goods necessarily became a part of the commerce of this country. The idea that war is a negation of commerce is based

upon the erroneous premises that commerce is confined to an exchange of commodities between peoples of different States. Such a narrow conception of the term has not been entertained by this Court from earliest times to the present. The Court has held that many transactions, other than trade or traffic, constitute commerce, from *Gibbons* v. *Ogden*, 9 Wheat. 1, down to and including *U. S.* v. *Southeastern Underwriters Assn.*, 322 U. S. 533.

"In the Gibbons case, the Court, in answer to the contention that commerce was limited to buying and selling or interchanging of commodities, said:

> "This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In *U. S.* v. *Southeastern Underwriters Assn.*, *supra*, the Court clearly defined the term "commerce":

> "The real answer to the question before us is to be found in the commerce clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. Lottery Case (*Champion* v. *Ames*) 188 U. S. 321, 355. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, *Hoke* v. *United States*, 227 U. S. 308, 320-323; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, *United States* v. *Simpson*, 252 U. S. 465; to drive a stolen automobile

from Iowa to South Dakota, *Brooks* v. *United States*, 267 U. S. 432, 436-439. Diseased cattle ranging between Georgia and Florida are in commerce, *Thornton* v. *United States*, 271 U. S. 414, 425; and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount Federal regulation. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 11. Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information."

Unquestionably the intent of Congress in the enactment of the Fair Labor Standards Act in 1938 was to lay down a plan for the operation of all industry, whether the operation was performed by private industry or by an independent contractor with the Government under a cost-plus-a-fixed-fee contract. At that time Italy and Germany were laying plans for the invasion of other countries. Predictions were freely made that the United States might eventually be drawn into conflict with foreign powers as had been the case in World War I. Employees in industrial and commercial plants were being exploited by compelling them to work long hours, at low wages, and under insanitary conditions. That such conditions might be corrected, the Fair Labor Standards Act was adopted.

"The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under sub-normal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the inter

ference arising from production of goods under conditions that were detrimental to the health and well-being of workers . . . . Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722.

The Court of Appeals for the Eighth Circuit, in *Helena Ferry Co.* v. *Walling*, 132 F. 2d 616, said:

> "That it was the intention of Congress to include within the protection of the Act every employee engaged in commerce or in the production for commerce within the broad scope of those activities expressed in the Act, is no longer open to doubt. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Bowie* v. *Gonzalez*, 117 F. 2d 11; *Kirschbaum* v. *Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88. The act is remedial and must be given a liberal construction in accordance with its obvious intent and purpose. 'We must assume that all employees in interstate commerce, so far as reasonably possible, should be made subject to the provisions of the Act', *Fleming* v. *Hawkeye Pearl Button Co.*, *supra*. Those asserting in reference to any employee an exception under the Act, must establish the exemption as being within the spirit and the letter of the statute. *Bowie* v. *Gonzalez*, *supra*. Since the statute is remedial, and by its terms includes every employment and employee coming within the broad scope of its coverage, the section granting exemptions is to be construed strictly against those claiming them. *Fleming* v. *Hawkeye Pearl Button Co.*, *supra*."

See also, *Mustein* v. *Johnson*, 113 F. 2d 106 (8 CA); *Joseph* v. *Ray*, 139 F. 2d 409 (10 CA); *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d 963 (9 CA).

> "When Congress defined 'commerce' in the Fair Labor Standards Act, Congress intended to give quoted term the broadest possible meaning, so as to include all transactions, conditions and relationships as had been theretofore known and acknowledged as constituting commerce in the constitutional sense." *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (5 CA), quoted with approval in *Bell* v. *Porter*, 159 F. 2d 117 (7 CA).

The contention that the Government cannot engage in commerce where it has a cost-plus contract has been repudiated by several courts.

In *Clyde* v. *Broderick*, 144 F. 2d 348 (10 CA), the Court said:

> "There is nothing in the Fair Labor Standards Act which indicates an intent or purpose to exempt from its coverage employees whose activities relate to the movement in interstate commerce of personally owned goods of an employer or goods moving interstate for the convenience of the United States Government. The Act creates no such exemption and we cannot. See *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (4 CA); *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945 (6 CA)."

In the Walling case (cited above) it was said:

> ". . . . The argument that it was the Congressional intention to make the Fair Labor Standards Act inapplicable to work under Government contract must be rejected. No reason appears why contractors for the Government are to be permitted to maintain sub-standard labor conditions while private contractors are prohibited from so doing and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time

when all, or nearly all, major industries are operating upon Government contract."

The above language was quoted with approval in *Walling v. McCrady Const. Co.*, 156 F. 2d 932 (3 CA).

See also on that point: *Fox v. Summit King Mines*, 143 F. 2d 926 (9 CA); *Rich v. Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (9 CA).

In the well considered case of *Jackson v. Northwest Airlines* (Minn.), 75 F. Supp. 32, Judge Nordbye, after quoting from Section 3 (b) of the Fair Labor Standards Act, said:

> "Neither this provision nor any other provision of the Fair Labor Standards Act declares that the United States Government can not be engaged in 'commerce' within the meaning and intent of that Act. And since the provision defines the term 'commerce' broadly and goes to the coverage of the Act, it must be construed liberally. So literally, the provision includes transportation by the Government across State lines with the term 'commerce', and the plaintiffs in question, according to the literal and plain interpretation of this provision, were in 'commerce' under the Fair Labor Standards Act. Nothing in the Act implies a contrary meaning.
>
> "Defendant, not the Government, is the one against whom these actions have been brought and who will be liable under this statute. No one is seeking to hold the Government liable under this Act. Any liability the Government may incur as a result of these proceedings results from a contract with defendant not from the statute. Neither the cases which defendant cites nor the policy upon which they are based, purport to effect such a situation. To do so here would cause the Fair Labor

Standards Act to turn upon the considerations other than the employer-employee relationship, as the Act clearly contemplates. Defendant must stand upon its own feet in this litigation as a private employer. The Government is not present as an employer.

"The defendant's claim that Section 3 (b) is inapplicable by implication to govern shipments and transportation is not supported by the fact that the Government is exempted from the 'employer' definition. Because the Government is exempted from the definition of employer and is thereby exempt from liability under the Act (because liability under the Act turns on the 'employer status') does not mean that the Government transportation activities cannot affect the liability of private persons under the Act. The questions of employer and commerce are separate and different ones.

"The real question here is whether, in view of any aid for determining Congressional intent to grant by implication under the commerce definition of the Fair Labor Standards Act an exemption which would deny the protection and benefits of the Act to employees of civilian employers who supply goods to the Government. That Congress did not intend to exempt the Government's transportation of goods across State lines from 'commerce' when such an exemption would deny the Act's protection to employees of private employers who supply the Government, seems clear from the purpose of the Act as well as from its literal wording.

"This Act is a remedial Act. Its purpose was to eliminate, not to perpetuate, sub-standard undesirable labor conditions and their effect upon transportation across State lines. It sought to exclude from transportation across State lines the goods produced for commerce under conditions detrimental to standards of living which are neces-

sary to the health and general well being of employees who produce the goods, and to prevent the use of transportation across State lines as a means of spreading and perpetuating sub-standard labor conditions among the workers of the several States. *United States* v. *Darby Lbr. Co.*, 312 U. S. 100. This was conceived by the Congress to be a basic need of the nation, and it is the public policy and need which must be kept in mind constantly when determining Congress' intent under the Act which was possible to accomplish this purpose. That this purpose would prompt Congress to include rather than exclude by silent indirection, employees of employers supplying the Government with goods, seems free from doubt. The Government is a large purchaser and transporter of merchandise, and the accomplishment of the purpose of the Act would be hampered seriously if the employees of employers producing goods for the Government were not protected by the Act. It is just as detrimental to labor conditions, industrial peace and standards of living if the Government transports goods produced under undesirable working conditions across State lines as when a private citizen effects such transportation.

"Well considered cases have reached the conclusion that Section 3 (b) of the Act does not intend that transportation by the Government should deprive any one Governmental employee, otherwise covered by the Act, from its protection."

In support the Court cites *Bell* v. *Porter, supra; Timberlake* v. *Day & Zimmerman* (D.C.Ia.), 49 F. Supp. 28; *Umthun* v. *Day & Zimmerman*, 235 Ia. 293; 10 N. W. 2d 238; *Roland* v. *United Airlines, Inc.* (N.D.Ill.), 75 F. Supp. 525; *Clyde* v. *Broderick, supra; Walling* v. *Patton-Tulley Co., supra.*

Continuing, Judge Nordbye stated:

"In the latter case the Court said: 'The argument that it was the Congressional intention to make the Fair Labor Standards Act inapplicable to work under Government contract, must be rejected. No reason appears why contractors for the Government are to be permitted to maintain sub-standard labor conditions while private contractors are prohibited from so doing, and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time when all, or nearly all, major industries are operating upon Government contract'.

"*Mamani v. Louis Berger & Trans. Co.* (D.C. Va.), 30 F. Supp. 742, holds that Government transportation does not prevent the mails from being in 'commerce' as between the employee who transports all of the mail from the trains to the postal station, and his private employer who has a contract with the Government to provide such transportation.

"Defendant has cited several cases in opposition: *Barksdale v. Ford, Bacon & Davis, Inc.* (D.C. Ark.), 70 F. Supp. 691; *Diring v. Hazeltine Elec. Corp.*, 70 F. Supp. 686, rev. in part (2 CA); *Krueger v. Los Angeles Shipping & Dry Dock Corp.* (S.D. Cal.), 74 F. Supp. 595; *Steinat v. Kaiser Co.* (D.C. Ore.), 71 F. Supp. 551; *Urban v. Victory Naval Building Co.* (D.C. Mass.), 74 F. Supp. 270.

"Those cases approach the problem on the theory that the transportation activity is a Governmental administrative act and therefore is not commerce, or else on the theory that the goods are war goods and, therefore, not in commerce. It seems more sound, however, to conclude that the rules of statutory construction and the broad intent and purpose with which Congress enacted the Fair Labor

Standards Act required the view that Congress did not intend to exempt by indirection and silence the employees of private employers who perform services or furnish goods to the Government for use by it even if the Government transports the goods across State lines with its own personnel or under its own name, or even if it intended to use the goods for the war purposes. The administrative capacity under which the goods were transported herein may be assumed. But is not such transportation 'commerce' as between plaintiffs and the defendant employers and employees in view of the purposes of the Fair Labor Standards Act? The one who transports the goods and its status in doing so has no necessary relation to the interstate activities of private employers and employees in view of the purposes of the Fair Labor Standards Act. Moreover, it is generally recognized that, as far as commerce is concerned, the one who owns the goods when transportation is effected, is immaterial.

"Commerce is indubitably necessary in the carrying on of a war. A country directing its entire industrial activities towards a successful prosecution of a global war must necessarily utilize the facilities of commerce in order to achieve its goal. And this is true whether the transportation is effected by the use of ordinary railroad or truck facilities carrying goods across State lines or effected by the Government's using its own personnel. If war is the antithesis of commerce when the Government owns or transports the goods which are ultimately designed for the war area, then it is likewise the antithesis of commerce when goods ultimately designed for the war area are shipped by a private producer or manufacturer. No good reason is suggested why commerce loses its identity as such in war times in an area where actual war is not being waged. The planes in question herein were not flown on any major activities directly

from the St. Paul Airport. As far as the records indicate, they were flown to other airfields or training stations within the United States and remained there until further orders were given as to their ultimate destination. The mere fact that a war exists does not necessarily mean that a distinction between interstate commerce on the one hand, and transportation as a part of an actual military operation on the other, must be lost. Although the transportation of plans or planes to and from modification center was a part of the war effort, it does not follow that it was a part of a military operation so as to negate the existence of commerce. War is not necessarily the antithesis of commerce which is carried on outside of the combat zone. If this were true, then all interstate activities, private and Governmental, directed to the successful prosecution of the war, fall outside of the sphere of commerce. These planes which were modified were flown across State lines after leaving the manufacturers en route to St. Paul, and, after modification by plaintiffs, were transported across State lines before they were engaged in any actual military operations. It is difficult to differentiate as far as commerce is concerned between the movement of war materials across State lines and bomber planes flown across State lines. Neither will be devoted to the war effort until after their arrival at their ultimate destination. Until that time they are in commerce within the Fair Labor Standards Act and the constitutional conception of the term as realistically as transportation of any other goods across State lines."

But the opposition may contend that some of the cases referred to turned on the question of instrumentalities used for the promotion of commerce, and not on the question of whether the employees themselves produced goods for commerce, for the reason that they manufactured an

nitions of war, and munitions of war were not goods in commerce.

That question was raised before the Court of Appeals, Seventh Circuit, in *Bell* v. *Porter*, *supra*. The Court held that the manufacture of munitions of war were goods produced in commerce under a Government cost-plus-a-fixed-fee contract.

The principal facts in that case were similar to the ones here. Among other things, the Court said:

> "Appellants operated the Elwood Ordnance Plant at Elwood, Illinois, where they were engaged in the manufacture of shells, explosives and munitions for the armed forces, under a cost-plus-a-fixed-fee contract with the United States Government. The plant, including all buildings, machinery and equipment, was owned by the Government, but all of it was managed and operated by appellants as independent contractors. The Government procured, owned and furnished appellants all powder and other component parts used in the manufacture of the munitions. Appellants, however, as consignees, procured and received certain other materials and supplies used in the assembling and loading of the munitions from various consignors without the State of Illinois. Title to these supplies vested in the Government at the time of delivery. All munitions produced at the plant were shipped from the plant to various army installations throughout the United States upon orders received by the commanding officer from the Ordnance Department in Washington, D. C. Appellants had complete supervision of employees, including the hiring and discharging of all employees. Upon these facts the District Court concluded that appellees were engaged in the production of goods for commerce within the meaning of the Act.

> "In support of their contentions appellants argue that Government owned goods shipped by the Government across State lines is an administrative act of the sovereign and is not interstate commerce, and that the word 'commerce' as used in the Fair Labor Standards Act is limited to 'commercial or business commerce'.
>
> "On the first point raised it will be enough to say that cost-plus-fee contractors with the Government engaged in war production are not agents of the Government and do not share the Government's sovereign immunities. *Alabama* v. *King* & *Boozer*, *supra*; *Curry* v. *U. S.*, *supra*. And it has been held that the production of goods for interstate transportation by or for the Government is production in commerce within the meaning of the Act. *Umthun* v. *Day* & *Zimmerman*, 235 Ia. 293, 10 N. W. 2d 238; *Clyde* v. *Broderick* (10 CA), 114 F. 2d 348."

After stating that Congress meant to define "commerce" in the Act so as to give it the broadest possible meaning which would include all transactions theretofore known as constituting commerce, the Court continued:

> "The constitutional power given to Congress to regulate 'commerce' is not confined to commercial or business transactions but includes the transportation of persons and property no less than purchase, sale and exchange of commodities and goods which may move in commerce though they never enter the field of commercial competition." (See citations in support.)

In *Umthun* v. *Day* & *Zimmerman*, *supra*, cited by the Court in the *Bell* v. *Porter* case, the Court held, as did the United States District Court of Iowa, in *Timberlake* v. *Day* & *Zimmerman*, *supra* (also cited in *Bell* v. *Porter*,

supra), that employees of the contractor operating the Iowa Ordnance Plant were covered by the Act. The Court used this language:

> "The act is remedial and is to be liberally construed. *Fleming* v. *Hawkeye Pearl Button Co.* (6 CA), 113 F. 2d 56.
>
> "The Wage and Hour Division of the Department of Labor has interpreted the Act to include such an employment as that involved here. This construction of the statute by the administrative department charged with its enforcement, although not binding on us, should be given our respectful consideration. *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572.
>
> "Determination of whether the Act is applicable depends not upon the nature of the employer's business, but upon the character of the employees' activities. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Clyde* v. *Broderick Co.* (10 CA), 144 F. 2d 348, and cases cited."

In *Lasater* v. *Hercules Powder Co.*, 73 F. Supp. 264 (6 CA), the contentions urged by petitioners in this cause were upheld. In that case, the defendant operated the Volunteer Ordnance Works for the manufacture of munitions under a cost-plus contract with the Government. The Government owned the ground and all of the personal property at the plant.

> "The whole operation was under the control of the Government. During the operation period Government officials were constantly present and actively supervised and inspected. Subject to the control reserved in the Government, the plant was

maintained and operated by the defendant as an independent contractor, including the right to hire and discharge all employees."

Defendant disclaimed liability because the plaintiffs were not engaged in commerce nor in the production of goods for commerce. Among other things, the Court said:

"The insistence has been made that the TNT, being munitions of war, was not 'goods' under the terms of the Fair Labor Standards Act. However, the defendant appears to concede that the definition in the Act is sufficient to cover the TNT, but that the commodity was not 'goods' as having been delivered into the actual physical possession of the ultimate consumer.

"The proof is that the TNT moved on Government bills of lading, but the defendant remained in possession of the TNT and did the shipping upon instructions from the Government. The cars were loaded and jointly inspected by the railroad, by the Government and by the defendant. This was done to meet the rules set out by the Interstate Commerce Commission. So actually the goods did not get into the physical possession of the United States before shipment. In addition, this provision of the Act is most probably for the benefit of the ultimate consumer and cannot be invoked by the producer.

"I might say parenthetically that evidently all hands thought all during the time of the manufacturing of TNT that this commodity was 'goods' moving in commerce for they were scrupulous to observe the rules of the Interstate Commerce Commission.

"Without an attempt to further and fully analyze this question, I give my opinion to be that the plaintiffs were engaged in 'the production of

goods for commerce' within the Fair Labor Standards Act."

The opinion of the District Court in the Barksdale case, *supra*, as one of the grounds for its ruling, stated:

> "The goods in question were munitions of war and were manufactured for the purpose of being consumed by the United States in the prosecution of the war. Hence the United States, in our opinion, was the ultimate consumer thereof within the meaning of the Act, and the plaintiff was not engaged in the 'production of goods' for commerce" (R.66).

The Court had in mind the exception mentioned in Section 3 (i) of the Fair Labor Standards Act, "Goods * * * does not include goods after their delivery into the actual physical possession of the ultimate consumer other than a producer, manufacturer or processor thereof".

The undisputed facts in this case are that respondent through its employees, had the actual physical possession of the goods at the time and while they were being manufactured and processed, and loaded on railroad cars or trucks. Petitioners' cause of action was not based upon a claim for compensation for any work done upon the goods, *after* they had been delivered into the actual physical possession of the United States but before such possession. Ford, Bacon & Davis, Inc., therefore, was not the ultimate consumer; it was the producer, manufacturer, or processor, and consequently not entitled to invoke the benefit of the exception stated in Section 3 (i) of the Act.

The above interpretation of Section 3 (i) is the one that the Administrator of the Wage and Hour Division has consistently placed upon that section of the Act. Interpretative Bulletin No. 5 (Oct. 1940), par. 6; re-

adopted without change in the 1947 revision. See 29 Code Fed. Reg. Part 776.7 (b), 12 Fed. Reg. 4583, 4585. There the Administrator interprets Section 3 (i) as not exempting employees working on the goods during the course of manufacture, and says that this section "does not affect the coverage of the act as far as the employees producing the products are concerned", and it concludes:

> "Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standard of the Act by making delivery within the State into the actual physical possession of the ultimate consumer, who transports or ships the goods outside the State."

In several of the decisions which are contrary to the contention of petitioners, the courts seem to have fallen into an erroneous interpretation of the terms of the contract relating to the "physical possession" of the materials produced and processed at the plants, and also of Section 3 (i) of the Fair Labor Standards Act.

That section defines "goods" as all commodities except "goods after their delivery into the actual physical possession of the ultimate consumer other than a producer, manufacturer or processor thereof". The decisions referred to base their position on the ground that because the United States at all times owned the materials and equipment which went into the production of the munitions they had "physical possession" of the goods. They overlook the fact that the exclusionary clause makes "actual physical possession", rather than title, the controlling feature. The contract between the United States and respondent makes it plain that only title and not actual physical possession was retained by the United States.

The contract provides that the contracting officer, representing the United States, "Shall at all times have access to the premises, work and materials" and "shall at all times be afforded proper facilities for inspection of the work" (S.R.64). It further provides that if the contract is terminated due to respondent's fault, the contracting officer "may enter upon the premises and take possession and all for the purpose of completing the work contemplated by this contract, of any or all materials, tools, machinery, equipment, and appliances which may be owned by or in the possession of the contractor * * * and may complete or employ any other person or persons to complete said work" (S.R.59). That would contemplate the full actual physical possession of all of the materials by the contractor and his employees during the period of manufacture or processing of the goods.

III

Petitioners Were Employees of Respondent—Not of the United States

The contract between appellee and the United States, the conduct of all the parties during the period in dispute here, and an abundance of decided cases, render the conclusion that appellants were employees of appellee and not of the United Stats, unassailable.

Under the contract (S.R.21-74), appellee was directed to employ all persons necessary to carry on the operations of the Arkansas Ordnance Plant "who shall be subject to the control and constitute employees of the contractor" (S.R.41). Appellee was obligated to hire, control, direct, pay and terminate all employees (S.R.41, 65). The briefest perusal of the contract is sufficient to apprise one of

the fact that the appellants were employees only of the appellee and were not employees of the United States. Reference is made to Art. VII-A (S.R.61); Art. III-A (S.R.38); Art. IV-A-1 (S.R.39); Art. IV-D-b (S.R.43); Art. IV-D-c (S.R.43); Art. V-A-1 (S.R.45); Art. V-A-1-d (S.R.46); Art. V-A-1-f (S.R.46); Art. V-A (S.R.61).

In circumstances where employees were not paid, suits to recover compensation lay against appellee—not against the United States.

At least since 1878 it has been well-settled that in circumstances such as the instant one, petitioners are employees of the cost-plus contractor and not of the United States. *United States* v. *Driscoll* (1878), 96 U. S. 421 (24 L. ed. 847).

In that case appellee sought to recover certain overtime compensation from the United States. Appellee had been employed by Ordway, a contractor, who had a cost plus contract with the United States to cut and furnish granite. During the period of the contract with Ordway the Government employed and paid a superintendent and clerk who were to be present at all times. The former was to see that everything was done according to the contract, and that no frauds were committed on the government. It was also his duty, at the end of every month, to certify Ordway's accounts for his expenditures during that time. The clerk was his assistant, and subject to his directions. The employees were engaged and paid as follows: when a man was set to work, Ordway's foreman gave his name to the clerk of the superintendent, who put it on the time-book. The foreman put the price opposite the name. The clerk kept a ledger account, made out a pay-roll at the end of each month, and had the men sign it.

It was approved by the superintendent, and delivered to Ordway, and he received the amount from the United States, with fifteen per centum added, according to the contract." 96 U. S. 423, 24 L. ed. 847.

In denying recovery, the Supreme Court held there was no privity between the employee and the United States as he was the employee of Ordway; and that the Government had nothing to do with the manner of payment, that was a matter between the contractor and the United States.

Here the contract between appellee and the United States by its own terms negates any inference that the United States is the employer. Under the contract appellees were required to make contributions for social security, unemployment compensation, group hospitalization insurance and workmen's compensation (R.30,35). Patently, were appellants employees of the United States they would not have been recipients of the benefits of social security, unemployment compensation, group hospitalization and workmen's compensation, as contemplated by the contract.

The more recent cases clearly support the contention of appellants that they are employees of the appellee within the scope of the applicable statutes.

In *National Labor Relations Board v. Atkins & Co.*, 331 U. S. 398, the appellee company refused to bargain with certain plant guards on the grounds that the guards were not their employees within the purview of Section 2(3) of National Labor Relations Act, 29 USCA 152(3). The company was engaged in war production and the plant guards were required to be civilian auxiliaries to the military police of the United States Army. The employment or dismissal of the guards was subject to Army control.

In holding the guards were employees of the company within the scope of the Act the Supreme Court said:

> "We cannot say that the Board was without warrant in law or in fact in concluding that respondent retained 'a sufficient residual measure of control over the terms and conditions of employment of the guards' so that they might fairly be described as employees of respondent. *The most important incidents of the employer-employee relationship—wages, hours and promotion—remained matters to be determined by respondent rather than by the Army.* Respondent could settle those vital matters unilaterally or by agreement with the guards. And the guards were free to negotiate and bargain individually or collectively on those items. It is precisely such a situation to which the National Labor Relations Act is applicable. It is a situation where collective bargaining may be appropriate and where statutory objectives may be achieved despite the limitations imposed by militarization. Under such circumstances, the Board may properly find that an employee status exists for purposes of the Act.
>
> "In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive *indicia* of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to

> control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present." *National Labor Relations Bd. v. Hearst Publications* (322 U. S. *supra*, 129; 88 L. ed. 1183, 64 S. Ct. 851)." (Emphasis added.)

In the instant appeal, it is undisputed that respondent retained control over those most important employee-employer relationships—*wages, hours and promotions.*

Another recent case is *Wilson & Co., Inc. v. National Labor Relations Board* (C. A. 8, 1947), 162 F. 2d 313.

In that case appellant petitioned for a review of the National Labor Relations Board order which directed appellant to cease and desist from violations of Sections 8.(1) and (5) of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C.A. 151, *et seq.*, and to require the company to bargain collectively with certain plant guards. This case was for all practical purposes similar to *National Labor Relations Board v. Atkins & Co.* (1946), *supra*, 331 U. S. 398, 91 L. ed. 1563. The plant guards here were first civilian auxiliaries of the United States Military Police and later were deputized as special deputy sheriffs.

In holding that the plant guards were employees of the company within the Act the Court stated (313):

> "We shall first consider the contention that plant guards are not employees. As a matter of law it is not true that the petitioner's plant protection employees lost their status as 'employees' under the Act by reason of militarization, or of deputization. The powers there given to them, among

other things, strengthened their qualifications to protect their master's property. By express regulations of the government such powers did not destroy the relation of master and servant existing at the time the new functions were bestowed upon them. This Court has held that 'to clothe a watchman appointed by a railroad company to guard its property with police powers does not transform, in any way his relation to the company as an employee'. *Chicago & N. W. Ry. Co.* v. *McKenna*, 7 Cir., 74 F. 2d 155, 157. We can perceive no substantial distinction between the relation of a 'militarized' plant guard and his employer and that of a 'deputized' guard and his employer.

"If any doubt existed as to whether the finding of the Board that militarized and deputized plant guards in the circumstances of this case are employees within the meaning of the Act is valid, that doubt has now been effectually removed by the decision of the Supreme Court on May 19, 1947, in *National Labor Relations Board* v. *E. C. Atkins & Co.*, 67 S. Ct. 1265, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 67 S. Ct. 1274. Both these points were presented in those cases and the findings and orders of the Board were sustained in each case."

Another similar and applicable case is *Jackson* v. *Northwest Airlines, Inc.*, *supra*. Here again was a cost-plus contractor and the applicability of the Fair Labor Standards Act was disputed. The District Court held:

"'*Defendant, not the United States Government, was the employer of each plaintiff.* Defendant was not the agent of the Government in the employee sense. *It was an independent contractor.* * * * It hired persons, including plaintiffs, to perform that work. It paid them from a payroll which ran in defendant's name. And when jobs were available

in other branches of the defendant company, the modification of employees could transfer to those branches. Such a right was in no way involved in the contracts between the Government and the defendant. * * * *It is plain, and the Government had direct and immediate control over the persons performing the work.* * * * The mere fact that the Government determined what work was to be done on the planes and inspected the planes after defendant completed the work on them is not important here. Anyone who hires another to perform work as an independent contractor states the work to be done, often in some detail. Defendant here was hired to perform the work set out by the Government, not to determine what work was to be done according to the military needs of the plant.

"Plaintiffs were paid by defendant, and took their orders from defendant. * * * The fact that the Government kept a deposit for the defendant on which defendant might draw for the expenses of plaintiffs' salaries and cost of the project seems unpersuasive because it is of little, if any, probative value. This was only the procedure by which the Government paid the cost of the project which it hired defendant to undertake. It seems no different than if defendant paid it out of its own money, as it often did. After all, every independent contractor is reimbursed for what he does in some manner or other and by some procedure.

* * * *

"*Under all the circumstances, as shown on the record, the actual employer, not the Government, was plaintiffs' employer.* And defendant's contention that the Fair Labor Standards Act is inapplicable here because the Government was the employer is unsustainable and must be rejected. Other Courts, interpreting similar war contracts, have held likewise. *Bell v. Porter*, 7 Cir., 1946, 159 F. 2d 117.

certiorari denied 67 S. Ct. 1092; *Tinkelenberg v. Dorg & Zimmerman*, D. C. Iowa, 1943, 49 F. Supp. 2, 31. See, also, *State of Alabama v. King & Boozer*, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3; 140 A.L.R. 615; *Carey v. United States*, 314 U. S. 14, 62 S. Ct. 48, 86 L. Ed. 9; *Maiquan v. Legg's Baggage & Transfer Co.*, D. C. Va. 1941, 39 F. Supp. 742." (Emphasis added.)

It is uncontroverted that instant respondent hired petitioners-employees; that respondent paid petitioners from its own payroll; that respondent transferred petitioners to other work as the needs arose; and that respondent had direct and immediate control over petitioners. Such being the case petitioners are clearly employees of respondent and not the United States.

Dicino, et al. v. Joshua Hendy Corporation (D. C. Calif.), 77 F. Supp. 893, is yet another case in point. In reviewing the general purposes of the Fair Labor Standards Act the District Court held (894-5):

> "The Fair Labor Standards Act, because of its nature and aim, has been construed liberally by all the courts which have had occasion to interpret it. Such liberality extends to all its provisions, and especially to what I might call, using an insurance term, 'coverage'. The courts have been very generous in determining which workmen are entitled to the benefits of the Act. One of the latest declarations on the subject is found in a case from the Tenth Circuit Court of Appeals. Judge Bratton states:
>
> "'In respect of coverage of employees, the definitive provisions of the Act are extremely comprehensive in their sweep. *United States v. Rosenwasser*, 323 U. S. 360, 65 S. Ct. 295, 89 L. Ed. 301. The Act is remedial and must be given a liberal construction with its manifest intents and purpose

> in view." (Citing cases.) * * * And in doubtful situations, coverage is to be determined broadly by reference to the underlying economic realities rather than by traditional rules governing legal classifications of master and servant on one hand, and employer and independent contractor on the other. Cf. *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170."

It is well settled, of course, that the Fair Labor Standards Act is a remedial act and accordingly must be liberally applied and construed. It is submitted, however, construed liberally or strictly, the act is clearly controlling here and the conclusion that the instant petitioners are employees of respondent is inescapable. In *Dewin, et al. v. Joshua Hendy Corporation, supra*, a far less convincing situation was presented than the one here, yet it was held that the employees were entitled to the benefits of the Act. The following quotation from that case sets forth the facts involved and the holding (899):

> "On October 28, 1945, the defendant was engaged in constructing cargo ships and assault troop ships for the United States Maritime Commission. The buildings and facilities of the defendant's shipyards, at Terminal Island, California, were owned by the Commission. All parts, materials, and supplies used in the construction of ships were owned by the Commission. The Commission had the right to hire or discharge employees, approved all wage rates, and was a party to all negotiations between the shipyard operators and the unions representing the employees. The Commission had representatives in the shipyards to watch the labor conditions and wage payments made by the shipyard operators.
>
> "While the defendant constructed ships, under contract with the Commission, the contractor, and it

alone, built the ships. And while the Commission had representatives to watch what was being done, *ultimately*, the responsibility was upon the defendant contractor, who was held responsible for the construction and delivery of the ships.

"Under the circumstances, I am of the view that the employees of the defendant are covered by the Act, as being engaged in the production of goods for interstate commerce, under subdivisions (b), (i), and (j) of Section 203 of Title 29 U.S.C.A. 201."

A. H. Phillips, Inc. v. *L. Metcalf, Walling, supra*:

"The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work'. Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably wtihin its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." (p.493).

In *Bell* v. *Porter, supra*, the appellees employees, who were firemen, were denied recovery of claimed overtime compensation for "sleeping time" since "* * * appellees, in consideration of their employment as firemen, were willing to sleep on the premises and to keep themselves available for duty if called during their rest period; their contract was to wait to be engaged; hence the time spent in sleeping is not compensable." (p. 120). Even though recovery was denied in this particular instance, the employees were nonetheless held employees of the appel-

lants under the Fair Labor Standards Act. The contractual relationship between the contractor in *Bell v. Porter*, *supra*, is so nearly like the situation existing between the instant respondent and the United States that it is considered desirable to quote that portion of the opinion setting forth the relationship, which it is submitted, fully supports the position of petitioners herein:

> "Appellants operated the Elwood Ordnance Plant at Elwood, Illinois, where they were engaged in the manufacture of shells, explosives, and munitions for the armed forces, under a cost-plus-fixed-fee contract with the United States Government. This plant, including all buildings, machinery and equipment, was owned by the Government, but all of it was maintained and operated by appellants as independent contractors. The Government procured, owned and furnished appellants all powder and other component parts used in the manufacture of the munitions. Appellants, however, as consignees, procured and received certain other materials and supplies used in the assembling and loading of the munitions from various consignors, without the State of Illinois. Title to these supplies vested in the Government at the time of delivery. All munitions produced at the plant were shipped from the plant to various army installations throughout the United States upon orders received by the Commanding Officer from the War Department in Washington, D. C. Appellants had complete supervision of all employees, including the hiring and discharging of all employees; and maintained their own fire department, in which appellees were employed as fire fighters."

In the performance of the contract by the appellee and the United States, appellee was an independent contractor.

Respondent contended in its pleadings that it was merely an agent of the United States, thereby asserting that its acts were those of the United States (R.14). It is assumed that it will further contend that it did not pay sales taxes to the State of Arkansas and that it received reduced freight rates upon shipments and other similar arguments (R.19). The circumstances that it did not pay sales taxes to the State of Arkansas and also received reduced freight rates do not establish that it was entitled to those benefits as it clearly was not a governmental agency. The erroneous decision of the Arkansas State Revenue Commissioner holding that respondent was not liable for payment of the Arkansas tax can not sustain such position here. In W. F. Whittel's affidavit he undertook to show that the Government was the direct purchaser of all shipments which went to the plant, as respondent, so he stated, was instructed to ship all materials to the Government (R.19). The contract does not justify such a conclusion. *Barksdale* v. *Ford, Bacon & Davis, Inc., supra*, adopted that erroneous interpretation. Attached to the affidavit of Mr. Whittel (Exhibit 3A) is a copy of the form used for all respondent's purchase orders (S.R.79). It shows "Operator: Ford, Bacon & Davis, Inc.," and directs the dealer to "* * * kindly enter order as specified below". The order is signed "Ford, Bacon & Davis, Inc., Operator", by ", , Purchasing Agent". "Ship to: Ordnance Property Officer, Jacksonville, Arkansas. For Account of Operator: Ford, Bacon & Davis, Inc., * * * Mail Direct to Ford, Bacon & Davis, Inc., Arkansas Ordnance Plant, Little Rock, Arkansas" (S.R.79). Nothing in the order form authorized any purchases to be charged to the account of the Government, nor were any such purchases charged to the Government. On the contrary purchases were charged and invoices were sent to appellee (R.39). The contractor was patently

without authority to bind the Government. In the event there had been a loss on purchases or goods, or if such had been damaged, the appellee, and not the Government, would have been the one to seek such recovery as might have been justified.

Substantially all of the issues raised, or that could be raised, in the foregoing statement have been disposed of favorably to the position of instant appellants by decision of the United States Supreme Court. *Alabama* v. *King and Boozer*, *supra*, and *Curry* v. *United States*, *supra*.

In each of the two Supreme Court cases cited above there were standard cost-plus contracts substantially similar to the one involved in this cause, which contracts provided for construction of certain buildings for the Army, and where in each case, the contractor was to be reimbursed by the Government for all authorized expenditures. *Alabama* v. *King & Boozer*, involved the question whether the Alabama state sales tax applied to materials purchased by the contractor in connection with the Government construction. *Curry* v. *United States* considered the application of the Alabama use tax on purchases of materials brought into the state and used in similar construction.

In both cases the procedure for ordering goods and materials used by the contractors was the same. All of the orders were approved by a contracting officer representing the Army in much the same fashion as was done in the instant case. In *Alabama* v. *King & Boozer*, the Government intervened and contended, among other things, that as it was the recipient of the materials so the contractor and the sales in reality were to the United States

The Court stated that "The soundness of this conclusion turns on the terms of the contract and the rights and allegations of the parties under it. The Court further held that the contractor was the purchaser and not the Government, and that the state sales tax was payable on the purchases. The Court, in passing on this question, stated:

> "The contract provided that the title to all materials and supplies for which the contractors were 'entitled to be reimbursed' should vest in the Government, 'upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the contracting officer'" (p.10).

A similar provision was incorporated in the contract involved here (Art. VII-D; S.R.63).

As stated earlier, in each of the two foregoing cases, the procedure followed in ordering materials was like that involved in the present cause. The lumber was sold and delivered on the order of the contractors as in the present case. The Court, in *Alabama* v. *King & Boozer*, held that,

> "* * * however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. * * * See also, *United States* v. *Driscoll*, 96 U. S. 421. * * *

> "* * * The circumstances that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a

cost-plus contract more than under a lump sum contract. Cf. *James* v. *Dravo Construction Company*, 302 U. S. 134, 82 L. ed. 155 * * *" (pp. 13, 14).

The Court in the foregoing cases held that there was no infringement of the Government's immunity in the imposition of the tax, notwithstanding the fact that the burden of the tax, since it constituted part of the costs and the contractor was to be reimbursed on a cost-plus basis, was passed on to the United States. The decision in *Alabama* v. *King & Boozer* supports the contention of the appellants that the Arkansas Revenue Commissioner was in error when he relieved the appellee of the obligations to pay the Arkansas sales tax.

The Supreme Court in *Curry* v. *United States, supra*, concludes that the contractors were not a governmental agent:

> "* * * We think that the contractors in purchasing and bringing the building material into the state and appropriating it to their contract with the Government, *were not agents or instrumentalities of the Government;* * * *." (Emphasis supplied.)

Since respondent is, as a matter of law, not an agent of the United States the conclusion is obvious that it must be an independent contractor.

In *Snyder* v. *Dravo Corporation* (D.C. Pa.), 6 F.R.D. 546, the District Court considered the motions by the plaintiffs for summary judgment and by the defendant for permission to amend its answer so that defendant might set up the defense that plaintiffs were not in the production of goods in commerce. The District Court denied the motion of plaintiffs for summary judgment

and permitted the defendant to amend its answer, and in doing so, observed:

> "I am aware that cost-plus-fixed-fee contractors of the Government engaged in work of production are not agents and do not share the Government's sovereign immunity."

In the case of *Penn Dairies* v. *Milk Control Commission of the Commonwealth of Pennsylvania* (1943), 318 U. S. 261 (86 L. ed. 748), the facts were these: an Army quartermaster had made a contract with the dairy under which the dairy agreed to furnish milk to an Army camp at prices below the minimum price established by the Milk Control Commission. The dairy was ordered to show cause why its license should not be revoked. The dairy contended that the application of the regulation of the Milk Control Commission to sales to a Government agency violated the constitutional immunity of the Federal Government. In this connection the Supreme Court of the United States said:

> "But those who contract to furnish supplies or render services to the Government are not such agencies [of the Government] and do not perform governmental functions [case citations omitted]; and the mere fact that non-discretionary taxation or regulation of the contractor imposes an increased economic burden on the Government is no longer regarded as bringing the contractor within any implied immunity of the Government from state taxation or regulation."

In *Timberlake* v. *Day & Zimmerman*, *supra*, a situation much like the instant one was presented to the Court. The defendant was "engaged in processing of war materials for the use of the armed forces of the United

States and operates a plant owned by the Government in or near the city of Burlington, Iowa, and known as the 'Iowa Ordnance Plant.'". The Court held:

> "That the defendant, Day & Zimmerman, in the processing work that it is doing for the Government, is an independent contractor and not an agent of the Government" (p.30).

Umthun v. Day & Zimmerman, Inc., supra, involved the application of the Fair Labor Standards Act. This was the same contractor and contract involved in *Timberlake* v. *Day and Zimmerman, supra*. The contractor operated the ordnance plant under a cost-plus-fixed-fee contract just as did respondent in this case. Plaintiff was an employee of the contractor. The company was again treated as an independent contractor. The Iowa Supreme Court said:

> "At all times involved here, defendant, a private corporation, *as an independent contractor*, and not as agent, operated the Iowa Ordnance Plant near Burlington under a contract with the United States Government by which the Government paid defendant a fixed fee plus expenses. * * *
>
> "* * * Plaintiff was not an employee of the Government but of a private corporation" (emphasis added) (16 N.E. 2d 261).

In *Walling* v. *Patton-Tulley Transportation Co., supra*, the employees in question were engaged on dike and revetment construction under contracts which their employers had with the United States. At p. 949 the Circuit Court of Appeals said:

> "The argument that there was the Congressional intention to make the Fair Labor Standards

Act inapplicable to Government contracts, must be rejected. No reason appears why contractors for the Government are to be permitted to maintain sub-standard labor conditions while private contractors are prohibited from so doing, and such view would thwart the perfectly defined purpose of the Congress, particularly if applied at a time when all or nearly all, major industries are operating upon Government contracts."

See also, *Walling* v. *McCrady Construction Co., supra*, where the argument that an independent contractor doing work for a Governmental unit is the alterego of that Governmental unit was rejected.

Respectfully submitted

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